Don’t Settle For Less

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The German Parliament will debate today a draft for a due diligence act intended to protect human rights in global supply chains, as submitted by the German government. The result of a dedicated campaign by civil society, this step constitutes a long-sought compromise and thus represents a major breakthrough as such. However, it was also long overdue, as the previous system of voluntary commitments by German companies intended to secure the protection of human rights within the supply chain has proven to be a failure, with only 13-17 % of German companies participating in the voluntary due diligence scheme. Moreover, recent lawsuits in German courts have vividly demonstrated the difficulty in establishing a clear legal basis for compensation claims of victims of human rights violations in the supply chain of German corporations.

While there is still a long way to go for a legally binding instrument in this area, the 2011 *UN Guiding Principles on Business and Human Rights* (‘UN Guiding Principles’) endorsed by the UN Human Rights Council established a non-binding framework of human rights standards in the context of corporate activity. Moreover, at the level of the European Union (‘EU’), both the European Commission and the Council are currently working on their respective position, the outgoing German Presidency in the Council having strongly advocated the issue. In anticipation, the EU Parliament has recently passed a resolution with an overwhelming majority, recommending to the Commission a draft directive (‘Draft Directive’) to regulate corporate due diligence in global supply chains. Meanwhile, after a thorough review of constitutional requirements, the German government has recently submitted to Parliament a draft law (‘Draft Law’) that would establish due diligence obligations of German companies as of 2023 (§ 3 Draft Law). Praised as a revolutionary step into the right direction by some, the proposal has however also faced harsh criticism from other sides.

In this blogpost, we argue that the German Draft Law – at least in its present form – is far from being as ambitious as the drafters pretend it to be. In this line, we highlight three key areas of concern within the draft legislation. Against the backdrop of the existing international framework and the proposed directive of the EU Parliament, we show that the current German Draft Law needs to be amended in order to live up to its own claim to fully implement international standards.

The Scope of Application

The first area of concern relates to the material as well as the geographical scope of application of the Draft Law.

First, the material scope of the envisaged law is limited to corporations with more than 3.000 employees (§ 1 (1) Nr. 2 Draft Law). Even in 2024, when this minimum-threshold will be reduced to 1.000 employees as stipulated in § 1 (1) Draft Law, last

sentence, the law would still only cover about 2.900 corporations in total. On the one hand, it has to be appreciated that this threshold is significantly lower than the one provided for in the French 2017 *Loi de Vigilance*, which in turn sets the minimum limit at 5.000 employees. On the other hand, the Draft Law falls significantly short of the expectations that were set in the non-binding German National Action Plan (NAP) of 2016, which is applicable to all companies with at least 500 employees and aims at implementing the UN Guiding Principles. Notably, it should be emphasized that both initiatives on the supranational level in turn address *all* companies, regardless of their size (respectively UN Guiding Principle No. 14 and art. 2 (1-3) Draft Directive).

On this question, the recommendation by Dr Miriam Saage-Maaß to distinguish not on the basis of the number of employees of the company concerned, but rather according to its revenue as well as to include all corporations operating in high-risk sectors, was unfortunately not incorporated into the current version. Such a risk-based focus on companies that are indeed critically involved in global supply chains, would allow to tackle the actual human rights issue in a more targeted and resource-efficient manner – and should therefore be introduced in the new law.

Meanwhile, the high threshold of the present proposal actually disproves critics who complain about the allegedly unbearable burden of paperwork for the companies concerned. This is due to the fact that those small businesses, that could indeed be overburdened are excluded from the scope of application *ratione personae* of the envisaged law from the outset. Similarly, the proposal by the EU Parliament, if adopted, would allow Member States to exclude “micro-undertakings” from the scope of application (art. 2 (4) Draft Directive). Interestingly, the EU Parliament’s proposal then includes the possibility of granting special support to small and medium sized undertakings in order to compensate their respective financial and administrative burden (art. 15 Draft Directive).

Second, regarding the geographical scope of application, the Draft Law only applies to companies with either headquarter, main base of business or registered office in Germany (§ 1 (1) Nr. 1 Draft Law). The demand expressed in the run-up to the legislative initiative to also address companies merely *operating* in Germany was thus not included in the current version of the Draft Law. In contrast, the Draft Directive at the European level goes further by covering, with some further restrictions, also non-European companies “when they operate in the internal market” (art. 2 (3) Draft Directive).

By amending the current Draft Law and focusing on the criterion of ‘*activity’* rather than ‘*head quarters’,* the German legislator could prevent serious gaps in the protection. This would also avoid creating disadvantages for German corporations in their competition with foreign enterprises that, while not being headquartered in Germany, are still operating in Germany.

Thus, the material and geographical scope of application of the Draft law in its current form is excessively limited in comparison to international standards and the proposal of the EU Parliament.

The Tiers of the Supply Chain under Scrutiny

The *rationale* of due diligence acts should be the *effective* protection of human rights along the *whole* supply chain. The truth is that indeed the risk of human rights violations increases the further down the supply chain one looks. However, with its limitation of due diligence to solely apply vis-à-vis direct suppliers, the current German Draft Law does not live up to this reality.

More precisely, the current version extends the company's due diligence to indirect suppliers only provided it has obtained corresponding substantiated *knowledge* about a possible violation of human rights or environmental obligations (§ 9 (3) Draft Law). This approach does not respond to the idea of a pro-active and effective *prevention* of human rights violations, as prescribed by applicable international standards. With a view to preventive protection, the UN Guiding Principles understand companies' responsibility comprehensively (Principle No. 13) and call for a risk analysis that extends to all "actual and potential adverse human rights impacts with which [the corporations] may be involved either through their own activities or as a result of their business relationships" (Principle No. 18). In a similar vein, the EU Parliament's Draft Directive also envisions a broader risk-analysis by defining 'supplier' as "any undertaking that provides a product, part of a product, or service to another undertaking, either *directly or indirectly*, in the context of a business relationship" (art. 3 (3) Draft Directive, emphasis added). Contrary to the current German Draft, both the existing international norms and the forthcoming EU regulation thus address the global supply chain in its entirety.

While German corporations could – voluntarily – extend their risk analysis also to suppliers further down their supply chain, this proactive and responsible behaviour could then trigger binding *obligations* if a risk was identified (§ 9 (3) Draft Law). Thereby, the current system of knowledge-based screening of indirect suppliers ('*anlassbezogen*') in fact discourages companies from monitoring the lower parts of their supply chain – which is diametrically opposed to the very purpose of due diligence acts.

The Lack of Civil Liability of German Corporations

Finally, the current Draft Law does not provide for civil liability of corporations for those human rights violations that have occurred due to a breach of their due diligence obligations. While the UN Guiding Principles already envisage the relevance of liability, and the Draft Directive of the EU Parliament explicitly requires Member States to provide for a "liability regime (…) under which undertakings can, in accordance with national law, be held liable and provide remediation for any harm arising out of potential or actual adverse impacts" (art. 19 Draft Directive), the German Draft Law remains silent on liability questions. This silence leaves injured individuals only with the pre-existing domestic regime of tort law ('*Deliktsrecht*'), which entails significant legal hurdles – of substantive and procedural nature – and therefore has only very little prospect of success.

First, the substantive conditions of German tort law are not adapted to the complex issue of human rights violations in the supply chains of multinational corporations. As an illustrative example, the existing catalogue of legal interests, such as life and physical integrity, does not explicitly enumerate human rights as such. Therefore,

commentators have called for an explicit clarification by way of an amendment to this catalogue, particularly in view of collective rights.

Second, the regime of German tort law presents significant procedural hurdles for victims of corporate human rights violations abroad, such as particularly the huge evidentiary difficulties. The complex corporate structure of multinational enterprises, the geographical distance of potential claimants – to cite just two of the numerous challenges faced by victims to produce evidence on the link between the damage and the (internal) conduct of the German corporation. The imbalance in factual knowledge and influence on site is evident. Consequently, a number of experts (i.e. Sandra Cossart, Dr Miriam Saage-Maaß, Robert Grabosch) had stressed in the run-up to the legislative initiative the need for a facilitated regime of evidence or a reversed burden of proof. Such an easing in terms of evidence is already applied to comparable situations in the German legal system, such as for producer liability. Realistically, the lack of any facilitation renders the access to justice almost futile from the outset.

To alleviate some of these concerns, the Draft Law itself offers two instruments: a special form of standing for interest groups and a regime of administrative supervision.

The insertion of a special standing for NGOs and trade unions ('*Besondere Prozessstandschaft*', § 11 Draft Law) to claim the victims' rights in their own name is very welcome. It will facilitate benefitting from the expertise and financial support of interest groups, such as NGOs. However, it is clear that this will not be sufficient to make up for the existing hurdles and imbalances.

For preventive control and reactive measures, the Draft Law creates a regime of thorough supervision by domestic authorities, more precisely the Federal Office of Economics and Export Control BAFA (§ 19 Draft Law). The powers of the authorities in this regard are comprehensive, allowing them to assess and investigate potential breaches (§§ 13 *et seq* Draft Law) and to impose sanctions in case of non-compliance (§§ 23 *et seq* Draft Law). However, this form of State control is not equivalent to an "effective remedy" for affected persons, as again required by international standards (e.g. UN Guiding Principles No. 25, 26). From a human rights perspective, sanctions are not comparable to compensation and redress for victims.

Summarizing, in order to fulfil its own purposes, the Draft Law needs to be amended to include civil liability for breaches of the corporations' due diligence.

The Protection of Human Rights in Global Supply Chains Needs Effective Remedies

While appreciating the democratic effort to reach this compromise, we have argued that the current Draft Law should be amended in the three areas carved out above. If the objective is really to establish a law that provides for an "effective remedy" for victims of human rights violations in global supply chains and that guarantees corporate accountability, we urge German lawmakers not to settle for less than is envisaged by international standards. Making the suggested changes would not

only be consistent with the German presidency's position in the EU Council, but also constitute a necessary step towards the effective protection of human rights in global supply chains.

Beyond this goal, and in view of a presumably upcoming binding regulation by the EU legislator, German corporations are well advised to reorganise responsibly their corporate activities as soon as possible, since "there is no way around responsibility for human rights".

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